

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BLUFFDALE MOUNTAIN HOMES, LC, and SOUTH FARM, LLC,	:	FINDINGS OF FACT AND MEMORANDUM DECISION
Petitioners,	:	
vs.	:	CASE NO. 040909930
BLUFFDALE CITY, a Utah Municipal corporation,	:	
Respondent.	:	

This matter came for trial pursuant to § 10-2-502.7, Utah Code Ann., on January 30, 2006, and continuing through February 2, 2006. Petitioners were represented by Bruce R. Baird of and for Hutchings, Baird and Jones, PLLC, and by Hollis S. Hunt of and for Hunt & Rudd. Respondent was represented by Dale F. Gardiner and Craig Klieneman of and for Parry, Anderson & Gardiner, as well as James K. Tracy and Patrick S. Malone of and for Mabey, Murray, LC. The Court, having heard the testimony of the witnesses, received the stipulations of counsel, reviewed the evidence and considered the legal arguments of the parties, hereby enters the following Decision.

FINDINGS

A. Jurisdiction

1 The petitioners have produced prima facie evidence that the disconnection petitions filed with the City contained the names,

addresses and signatures of the owners of more than fifty percent of the real property in the area proposed for disconnection. The City has admitted this fact.

2 The City has further admitted that all of the procedural prerequisites for filing this disconnection case exist.

B. Description of the Disconnection Property

3 The property which is the subject of this disconnection action is a triangle shaped parcel of approximately 3,900 acres in the southwest corner of Bluffdale City. The total acreage represents approximately 38% of the land area of Bluffdale City.

4 The land is almost completely undeveloped. There exists some water conservancy district facilities on the eastern border of the disconnection property. There is also one dwelling. With these exceptions, there are no structures on the disconnection property.

5 The one dwelling that exists on the disconnection property receives only garbage pickup services from Bluffdale City. The dwelling is served by a well and a septic tank on the property.

6 The disconnection property is separated from Bluffdale City by substantial manmade barriers. The primary barrier is a 35' wide canal known as the "Welby/Jacobs Canal." The easement associated with this canal is wider than the canal itself. This canal forms the western border of the disconnection property for the majority of its length. The balance of the western border is Redwood Road. There are no public bridges that cross the Welby/Jacobs Canal.

7 There are no public roads on the disconnection property. The only City-owned facilities that exist on the disconnection property are a 12" water pipe and associated meters and pressure reduction facilities that runs parallel to the Welby/Jacobs Canal.

8 The water line does not currently serve the disconnection property. The water line was installed primarily to provide additional water pressure and fire protection for the Gardner Estates and other new developments in the northern section of Bluffdale City east of the Welby/Jacobs Canal and outside the disconnection area. Though this water line has some additional capacity that could be directed toward the disconnection property, serving this property was not the primary motivation for its installation. The petitioners were not consulted with respect to the size of the pipe.

9 The only services historically provided by Bluffdale City to the disconnection property are minimal police and fire protection. There was evidence that the police had made calls to the property approximately twice a year to investigate trespass or other minor criminal conduct. In addition, there have been seven to eight fire calls per year.

C. History of the Dispute

10 During the 1980's, the entity now known as "South Farm" (the lead petitioner in this case), purchased property for investment and development that existed one-half in unincorporated Salt Lake County and one-half in Bluffdale.

11 The one-half which was located in Bluffdale is now entirely located within the disconnection property.

12 Early in its efforts to develop this property, South Farm sought to have its entire property annexed into Riverton, so that it could be developed as a consistent whole. Bluffdale objected to the annexation. Based on Bluffdale's objection, annexation was denied.

13 After defeat of the annexation petition, South Farm began an application process with Salt Lake County to begin development of the portion of its property that was located outside of Bluffdale City. The process included public meetings with all neighboring communities.

14 The County approved the General Plan of Development over the objections of Bluffdale in August of 1999.

15 The County portion of the South Farm property was ultimately incorporated into the City of Herriman, and has since been largely developed. This development is known as "Rosecrest" and currently includes approximately 18 subdivisions and 2,000 residential units.

16 By all accounts, the Rosecrest Development is a successful and attractive mixed-use development, representing high standards of land use planning.

17 The Bluffdale portion of the South Farm property has not proceeded as smoothly towards development. In October of 1997, Mr. Don Wallace, a managing member of South Farm, appeared at a public meeting to explain and answer questions regarding South Farm's plans for its land in Bluffdale.

18 The reaction to Mr. Wallace's presentation was emotional, if not outright hostile. Mr. Wallace testified that he felt physically threatened by the intensity of the opposition expressed in the meeting.

19 During the time period beginning in the late 1990's and concluding in May of 2002, South Farm was dissuaded by City officials from presenting any development plans with respect to their Bluffdale property. During this period, Bluffdale City was gearing up to address the inevitable development pressure that it would face, given the growth in the southern area of Salt Lake County.

20 Bluffdale City recognized the need for long range planning, and commenced work on capital improvement plans, transportation plans, water plans, drainage plans, and similar efforts to plan for the city it wished to be in the future. The City wanted to have its own planning house in order before it invested the necessary resources to consider a project of the scale intended by South Farm.

21 Given the magnitude of the project and the limited resources of the City, the planning process was time consuming. From South Farm's perspective, the progress was excruciatingly slow. In fact, the planning process that began during this time frame continues up through the time of trial. Most of the plans remain either unfinished or unadopted.

22 During this process, South Farm was persuaded by the City to hold off on filing any applications for an amendment to the City's General Plan that would allow development of its Bluffdale property.

23 The particular elements of internal planning that needed to be finished before consideration of the South Farm Development, as well as the time estimates for completion of those elements, were moving targets that never seemed to be within reach.

24 The City was, in fact, in good faith working toward completion its planning process; however, there were clearly elements in the City that were hostile to Rosecrest-like developments within Bluffdale City. The Court accepts the reasonable inference that some foot-dragging was taking place--whether intentionally or as a result of the natural human tendency to defer consideration of issues that are likely to be contentious.

25 During this same period, South Farm was encouraged by the City to engage in the process of producing a Quality Growth Plan. The process included numerous public meetings with representatives of the City and other stake-holders.

26 A draft of that Plan was produced in September of 2001. The Quality Growth Plan, although never formally adopted by the City, gave South Farm hope that a Rosecrest-like development was in reach. For example, the Quality Growth Plan approved recommended densities as high as 2.5 in the disconnection area (provided 35% open space was also reserved).

27 The Quality Growth Plan was by no means an unequivocal endorsement of a Rosecrest-like approach. It frankly acknowledged the City's commitment to a "rural-like atmosphere" and a strong preference for developments with minimum lot size of one acre.

28 In the fall of 2001, Shane Jones, the City Engineer, approached Don Wallace for an easement across South Farm property for a 12' water line needed to service newly-developed portions of the City.

29 Before those discussions were complete, in October of 2001, a contractor hired by the City trespassed on South Farm property to commence work on the water line.

30 The City urgently needed the water line to address water pressure and fire protection in Gardner Estates and other new developments in the northern section of the City east of the Welby/Jacobs Canal.

31 In order to obtain the needed easement and resolve the trespass issue with the City, the City and South Farm discussed a trade of the easement for adoption of planning policies allowing South Farm to develop its property consistent with the existing Rosecrest Development. In the context of those discussions, at a City Council meeting, the Council was told the following by the City's attorney, Greg Curtis:

Mr. Curtis advised that what this resolution does [with reference to the South Farm property] is recognizes that this will be a mixed residential, commercial, open space, trails, schools, etc., in a manner that is compatible with the Rosecrest Development in Herriman. This is a policy decision that the City Council needs to make. The developer is saying that the City wants an easement across the property and in an effort to balance out those interests, the developer wants to know what the City intends with the developer's property. Mr. Curtis advised the Council not to vote for this if the only thing they are going to support at this site is one acre lots.

Mr. Curtis stated if the City doesn't provide infrastructure for development, landowners make a very compelling argument to disconnect.

* * * * *

Mr. Curtis advised the Council if they are not comfortable with the mixed use development out in Herriman, not to vote for this resolution.

32 At the same meeting, former county council member and current mayor, Claudia Anderson, asked:

if the Council doesn't approve this resolution, would the developer take the land and go elsewhere?

To which Mr. Curtis replied:

it would be fair to say that one of their options would be to attempt disconnection.

* * * * *

If the Council is not comfortable with this and doesn't want mixed-use there, don't vote for it.

33 Ultimately, on January 8, 2002, the Bluffdale City Council unanimously approved Resolution No. 2002-5, which resolved the easement issue and provided the following statements of good faith:

Rosecrest has agreed to provide the requested easement without cost to the City, but in turn has requested a declaration of intent from the City as to the general acceptability of Rosecrest's future development of the Rosecrest real property which lies in the City. Rosecrest is in the process of completing an existing master planned project, a mixed-use real estate development in the town of Herriman which is contiguous and immediately adjacent to the Rosecrest real property located in the City and is desirous to continue the development of its Bluffdale property with similar mixed uses, density, and transportation elements as existed in its existing master planned project in Herriman.

(b) Subject to the express continued administration of its legislative and regulatory authority over development of the Rosecrest real property and without waiving any of its future regulatory authority, the City declares its intent regarding the development of the Rosecrest property as follows:

(1) That the best use of the Rosecrest property in the City is to develop the Rosecrest property with a mixture of uses, density, commercial, recreational, transportation and open space elements compatible with Rosecrest property in the town of Herriman that is adjacent and contiguous to the Rosecrest property in the City of Bluffdale.

34 By letter, dated December 21, 2001, Bruce Parker, City Planner for Bluffdale City, wrote to Mr. Wallace to again dissuade him from proposing a General Plan Amendment until the City's internal planning was

complete. In essence, the letter provided two choices: (1) wait until we're ready or (2) propose a development consistent with the current zoning, which was one dwelling per five acres.

35 South Farm waited an additional six months and observed no significant progress towards completion of Bluffdale's internal planning.

36 On May 6, 2002, South Farm formally submitted its General Plan Amendment, even though the City's planning process was incomplete. The General Plan Amendment was intended to be patterned on the principles of the Quality Growth Plan--although clearly beyond the letter of that plan--and consistent with the principles recognized by the City in the adoption of Resolution 2002-05. The City began immediate consideration of the application through its planning staff. Once again, because of the sheer size of the project and the limited resources of the City, the progress was unreasonably slow.

37 On November 12, 2002, the City adopted a series of land use planning principles for Planning District No. 4 (which includes essentially the same area as the proposed disconnection). Those principles included:

Planning District No. 4 should generally provide opportunities for low density residential uses, with residential density of one (1) dwelling unit to one (1) acre and one (1) dwelling unit per five (5) acres being provided.

Only in those areas located immediately adjacent to an existing and neighboring municipality, and only in order to recognize adjacent land uses and to provide the desired land use transitioning and compatibility, shall commercial, professional office, public uses and residential uses with densities greater than recommended by Policy No. 1 be considered by the City.

(Emphasis added.)

38 The meaning of "immediately adjacent" in the second principle referenced above became an important area of contention. If that phrase is read as narrow as the "narrow strip bordering on the existing Rosecrest Development," it was significantly more restrictive than the recommendations of the Quality Growth Plan and a complete repudiation of Resolution 2002-05. On the other hand, if the entire South Farm property were considered "immediately adjacent," a Rosecrest-like development could still be achieved.

39 The year following submission of the General Plan Application was characterized by dozens if not hundreds of meetings between South Farm and City staff, without any discernible progress towards submission of a proposed amendment for approval.

40 Because of this apparent lack of progress, South Farm proposed outsourcing review of the proposed General Plan Amendment. Bluffdale accepted the suggestion, and on April 22, 2003, hired J-U-B Engineers, Inc., and Tischler & Associates, Inc., to act as the City's consultants to review the plan. The consultants were selected by the City, with South Farm's agreement to advance the cost of their work.

41 These consultants completed their report on or about July 7, 2003. Once again, dozens of meetings were held to address the concerns raised in the J-U-B/Tischler report.

42 By the time the General Plan Amendment was ready for consideration by the City Council, South Farm had invested almost a million dollars in the planning process and thousands of man-hours. The proposed General Plan Amendment was considered by the City Council on

December 9, 2003. The Planning Commission recommended adoption of the General Plan Amendment. The City's consultants, J-U-B and Tischler also recommended adoption of the General Plan Amendment. However, the City Council voted to reject the Plan, based upon a narrow reading of Planning Principal No. 2, in the Planning District No. 4 Land Use Principles.

43 Other property owners, including some of the petitioners in this case, had closely followed the progress of the South Farm efforts to develop their property, and were disillusioned by the results.

44 On February 12, 2004, the petitioners filed a Petition with the City for voluntary adjustment of the boundary with Herriman to move the disconnection property from Bluffdale to Herriman, or in the alternative, to disconnect the property from Bluffdale City. That Petition was rejected by the City. This case was filed May 31, 2004.

45 Throughout the year 2005, a Herculean effort was undertaken by the City and the petitioners to resolve their differences and come up with a land use plan that would satisfy both.

46 On May 24, 2005, the City Council approved a Memorandum of Understanding that set a framework for development of the disconnection property.

47 On August 23, 2005, the City Council approved a Special Development Plan District Ordinance, that was a necessary prerequisite to implementing the Memorandum of Understanding in the disconnection property (and that would create an SDP Zone).

48 Bluffdale citizens opposing the development applied for a referendum to overturn the Council's decision to create the SDP zone.

Ultimately, sufficient signatures were collected, and the referendum is set for June of 2006.

49 In order to avoid the delay that would be caused by the referendum, the petitioners and the City worked out a development plan agreement that would be implemented by a Consent Decree.

50 The proposed Consent Decree was approved by the City Council, but once again Bluffdale citizens applied for a referendum to overturn the Council's approval.

51 On November 10, 2005, the Court rejected the proposed Consent Decree.

D. Disconnection Impacts

52 The property is currently undeveloped and will remain undeveloped immediately after disconnection.

53 In its raw state, the disconnection property produces \$1,750 of annual tax revenue for Bluffdale City. If the property is disconnected, it would produce something over \$4,000 of annual property tax revenue to Salt Lake County.

54 As raw ground, the disconnection property requires minimal services, and only limited police and fire protection.

55 The petitioners intend to apply for annexation of the disconnection property by Herriman.

56 The parties have stipulated that annexation of the disconnection property by Herriman is mandatory if a proper application is made.

57 The Court takes judicial notice that annexation by Herriman would not be instantaneous, but would be subject to statutory time frames for notice and consideration of the petition by Herriman City.

58 Based upon the success of the Rosecrest Development currently existing in Herriman City, it is more likely than not that South Farm could obtain approval from Herriman for a Rosecrest-like development on the disconnection property.

59 South Farm intends to propose a development modeled after Exhibit 123, with the exception that the infrastructure enhancements and amenities negotiated for the benefit of Bluffdale would not be built.

60 Even though residential development appears to be a net loss for a city because the increased cost of services and infrastructure exceed the increased property taxes, a critical mass of residential development, coupled with commercial development, attracts sufficient retail business to the city to provide more than offsetting revenues through sales taxes.

61 Amounts invested by Bluffdale City in infrastructure in the remaining portion of Bluffdale City, such as storm drainage and roads were necessary to serve existing Bluffdale City without regard to the status of the disconnect property.

62 Loss of potential future benefits to Bluffdale City, such as the loss of economies of scale and the opportunity to locate facilities for secondary water system on the disconnect property are too remote and speculative to be considered.

63 Based upon the evidence presented by petitioners, and in the absence of credible evidence to the contrary, the increase in traffic arteries leading to Bluffdale from the proposed development would only be 2.5%.

64 The City owns the easement for the 12" water line and related facilities that are now serving Gardner Estates and other newly-developed areas in the northern section of the city east of the Welby/Jacobs Canal and can continue to use that water line, regardless of the disconnection.

65 The proposed development would have no effect on the cost of Bluffdale City's water services.

66 Bluffdale City currently plans for enhancement of its storm drainage system due to water flowing from the disconnection property towards Bluffdale City. The proposed development will not require any additional storm drainage facilities, and would likely improve the control of storm drainage affecting the city.

67 If the land is developed, the drainage would be collected and channeled, and managed more efficiently. Petitioners would be required by State law to ensure the development would not add to the volume of storm drainage from the disconnection property.

68 Whether the land is developed or not, there will be no effect on sewer mains or sewer services, because both the disconnection property and Bluffdale City would be served by the South Valley Sewer District.

69 Development of the land as proposed will not affect the cost of law enforcement to Bluffdale City.

70 The proposed development will not affect the cost of zoning or other municipal services.

71 Based upon credible expert testimony, the proposed development will not affect the cost of City services.

72 No property owner affected by disconnection has objected to the proposed disconnection.

LEGAL ANALYSIS

The case before the Court is a statutory cause of action brought by property owners against Bluffdale City to disconnect approximately 38 percent of the land area of Bluffdale City. The statute at issue provides in its entirety:

10-2-502.7. Court action.

(1) After the filing of a petition under Section 10-2-502.5 and a response to the petition, the court shall, upon request of a party or upon its own motion, conduct a court hearing.

(2) At the hearing, the court shall hear evidence regarding the viability of the disconnection proposal.

(3) The burden of proof is on petitioners who must prove, by a preponderance of the evidence:

(a) the viability of the disconnection;

(b) that justice and equity require that the territory be disconnected from the municipality;

(c) that the proposed disconnection will not:

(i) leave the municipality with an area within its boundaries for which the cost, requirements, or other burdens of providing municipal services would materially increase over previous years;

(ii) make it economically or practically unfeasible for the municipality to continue to function as a municipality; or

(iii) leave or create one or more islands or peninsulas of unincorporated territory; and

(d) that the county in which the area proposed for disconnection is located is capable, in a cost-effective manner and without materially increasing the county's costs of providing municipal services, of providing to the area the services that the municipality will no longer provide to the area due to the disconnection.

(4) In determining whether petitioners have met their burden of proof with respect to Subsections (3)(c)(i) and (ii), the court shall consider all relevant factors, including the effect of the proposed disconnection on:

- (a) the municipality or community as a whole;
- (b) adjoining property owners;
- (c) existing or projected streets or public ways;
- (d) water mains and water services;
- (e) sewer mains and sewer services;
- (f) law enforcement;
- (g) zoning; and
- (h) other municipal services.

(5) The court's order either ordering or rejecting disconnection shall be in writing with findings and reasons.

As provided in the statute, the petitioners have the burden of proving each element of disconnection by a preponderance of the evidence.

In addition to disputing that the petitioners have met their burden of proof under the statute, Bluffdale City claims that disconnection in this case is inappropriate because petitioner's sole remedy lies either

in an appeal of the zoning and planning decision which prompted this action, or in the boundary adjustment statute.

For the reasons set forth in the foregoing Findings and in the legal analysis to follow, the Court believes that petitioners have met their burden of proving the statutory prerequisites to disconnection. In addition, the Court rejects the City's arguments that petitioner's sole remedy lies elsewhere.

The Court has received evidence of the impact of disconnection, both as the land presently sits, and as a result of the development that is likely to occur. Though the Court is of the view that the primary test should be disconnection of the property as it now exists, the Court has also considered the effects of the proposed development to the extent that they can reasonably be determined.

(a) The disconnection is viable.

The Court finds by a preponderance of the evidence that the disconnection is viable whether the property remains undeveloped or is annexed into Herriman and developed into a Rosecrest-like project.

The cost of services currently being provided to the proposed disconnect area will not change immediately following the disconnection. On the other hand, after disconnection, when the land becomes a part of the County, the tax revenue from the land will more than double its current \$1,750 to \$4,000. In this sense, the subject land is, if

anything, more viable as raw land in the County than it is in Bluffdale city.

Consideration of whether the disconnect property will remain viable once it is developed presents a more complicated question. The parties agreed that annexation by Herriman City is inevitable. The parties also agree that considered in isolation, residential development is a net financial loss to a city. Karen Wikstrom of Wikstrom Planning and Consultants testified credibly that because of the increase in the "critical mass" of population brought by the planned development, together with planned and existing commercial and retail elements, the planned community will provide more than offsetting revenues through sales taxes.

Based on the foregoing, the Court concludes that the disconnection property would be viable, even if disconnected, annexed into Herriman, and developed as proposed by the petitioners.

(b) Justice and equity favor disconnection.

Justice and equity have traditionally been the primary test for determining whether disconnection was appropriate. The statute was amended, effective May 1983, to its current form. As the statute now reads, most of the factors that courts historically considered in determining whether justice and equity favor disconnection are specifically set forth. The justice and equity test as used in the current statute is apparently intended to give the Court broad discretion to consider all impacts of disconnection. In that spirit, the Court received opinions from virtually every witness that testified as to why

justice and equity either did or did not require disconnection in this case. Notably, no landowner who would be affected has objected to disconnection. Having considered that evidence, the Court finds that justice and equity require disconnection for three reasons: undeveloped land has historically been considered appropriate for disconnection; Bluffdale City's zoning and planning process was characterized by unreasonable delays and changing standards; and Bluffdale's current political environment precludes an orderly development process.

(1) Undeveloped land has historically been found to be appropriate for disconnection.

The proposed disconnection property in this case is completely undeveloped. There are few structures of any kind on the property, no public roads, and little infrastructure. The cases dealing with disconnection have universally found such property appropriate for disconnection.

In the case of In the Matter of the Disconnection of Territory and Restriction of Corporate Limits of City of Draper, 646 P.2d 699 (1982), the court focused on the undeveloped nature of the property in determining that disconnection was appropriate:

These cases provide adequate guidelines in the instant case. The territory to be disconnected is wholly agricultural in nature. Draper does not have a municipal sewer system, nor is it likely that it will acquire one. There is no municipal water system within the city of Draper, and no negotiations have occurred for the purchase of a water system. There have been no municipal improvements within the area to be disconnected. There is no substantial economic relationship between Draper and the area to be disconnected. Draper City provides minimal police and fire protection.

Id. at 702. See also, In the Matter of the Disconnection of Territory from Layton City, 494 P.2d 948, 949 (1972); and Kennecott Copper Corporation v. City of Bingham Canyon, 415 P.2d 209, 211 (1966). In each of these cases the court placed great emphasis on the undeveloped nature of the property to be disconnected. It does not appear there has ever been a case where disconnection of undeveloped property has been found to be inappropriate. In this case, the fact that the property at issue is undeveloped is an important factor favoring disconnection.

(2) Bluffdale's zoning and planning process as applied to South Farm reflects unreasonable delay and arbitrarily changing standards.

The Court has consistently ruled in this case that this is not a planning and zoning dispute. The Court cannot and would not disconnect property from Bluffdale City simply because it disagreed with a zoning decision made by the appropriate governmental authority. While justice and equity do not require any specific outcome from a planning and zoning process, they do require that the planning process be fair, expeditious and consistent. The Bluffdale process as applied to South Farm lacks these elements.

South Farm was attempting to develop a substantial piece of property that happened to be about 50 percent in Bluffdale and 50 percent in Salt Lake County. The County portion of the property is not only developed, but is nearly built-out. The Bluffdale portion remains raw land. The primary explanation for the difference between the two parcels is the delay imposed by the Bluffdale planning process. For approximately four years, South Farm was not even permitted to submit a

development plan because Bluffdale was not sufficiently far along in its own planning process to consider such a plan. This internal planning process never seemed to achieve critical mass and remains largely unfinished to this day. Justice and equity do not require a city to bend to a developer's will, but they do require a timely response. Where a city has struggled, as Bluffdale has, to get its planning house in order and the result has been inordinate delays in responding to development initiatives, justice and equity may require that the developer be permitted to pursue its goals in another jurisdiction.

Similarly, justice and equity require that the City not commit to good faith consideration of a multi-use development and then completely repudiate that approach. The evidence in this case is that by encouraging South Farm's participation in the Quality Growth Plan and passing Resolution 202-05, Bluffdale expressed commitment to mixed-use development in the disconnection property. Hundreds of thousands of dollars were invested in reliance on that commitment. The City's decision thereafter to change course may be within its legal prerogatives, but is nevertheless a factor that can be considered in determining whether justice and equity requires disconnection.

(3) Bluffdale's current political environment precludes an orderly development process.

The political environment in the City is a factor that in justice and equity favors disconnection. The proposed South Farm development has been an emotional and contentious issue since the first public meeting in October 1997. The divisions have escalated to the point that

virtually any decision made by the City in favor of development is subject to a referendum. In the current climate, it is simply not possible to negotiate with the City. The City's administration has in effect become an agent with no authority, who can say no, but can never say yes, and provide a reliable decision, not likely to be attacked by referendum. Leaving the property in the City will only prolong this dysfunctional and contentious process. The Court is not suggesting that citizen involvement or the referendum process is anything but salutary. It is, however, an unwieldily mechanism for making zoning decisions. That unwieldiness is a factor favoring disconnection in this case.

(c) Disconnection will not leave Bluffdale with an area within its borders for which the cost of providing municipal services would materially increase.

Based upon the findings above, the Court concludes that the disconnection of this land, when considered as raw ground will not, and cannot materially increase Bluffdale City's historical costs, requirements, or other burdens of providing municipal services to any remaining portion of the city. Accordingly, there is no basis under the primary analysis to prevent disconnection under Section 502.7(c)(i). Conflicting evidence was heard on the effects of development on the existing historical city, most notably the evidence regarding traffic flow on existing streets. While both parties' witnesses agreed there would be an increase of traffic on the streets now located in Bluffdale city, Steve Goeres, Petitioner's traffic analyst specifically testified that the increase would only be 2.5%. When countered only by Shane

Jones' general and unsupported testimony that it would be greater than that, there can be no other conclusion than that the increase in traffic would be minimal, and would not cause a material increase in the current and historic costs of maintaining those roads.

While the witnesses agreed that development decreases the permeable surface area of the land, thus increasing the amount of surface runoff, even the City's witness conceded that development is better in terms of storm water management because the water is channeled, controlled and managed more efficiently. State law would preclude the development from adding to the volume of storm drainage from the disconnection property.

Sewer services are currently provided to the city by South Valley Sewer district, and the subject property, when developed would also be served by the district. Because this is not a service provided by the City, however, it is not considered for purposes of the proposed disconnection. At trial, all the credible evidence suggested that there would be no material increase in the cost to the city to provide law enforcement, zoning or other municipal services as a result of the disconnection of the land, after the land is developed.

In short, petitioner established through expert testimony, by preponderance of the evidence, that whether developed or not, the disconnection of the subject property would not materially increase the cost to the City of providing municipal services to any existing portion of the City.

(d) Disconnection would not make it unfeasible for Bluffdale to function as a municipality.

The evidence at trial clearly established three reasons that disconnection would not make it unfeasible for Bluffdale to function as a municipality: the loss of tax revenue is insignificant; there would be no material impact from the proposed development; and Bluffdale City's proposed growth plan for the subject property would be impractical.

(1) There is no significant loss of revenue

As raw land, the disconnection property generates approximately \$1,750 in tax revenue for Bluffdale City. Loss of this insignificant amount, when considered against Bluffdale's budget as a whole, would not be enough to make it unfeasible for Bluffdale to function as a municipality. Furthermore, in the context of the consideration of Bluffdale's ability to function as a municipality, **all** that Bluffdale is losing is raw land, with its associated \$1,750 in revenue. From the evidence presented at trial, the Court cannot conclude that Bluffdale's continued existence hinges upon its ability to develop this raw land in the manner it has proposed.

(2) There is no material impact from development

The Court's conclusion above that the disconnection would not leave the City with an area within its boundaries for which the costs, etc. would materially increase over previous years, also supports the conclusion that such immaterial increases in costs, if any, would not make Bluffdale's continued existence unfeasible. This is particularly true in the case of the costs associated with maintenance and improvement of existing roadways. The evidence suggested that these costs are necessary infrastructure costs which would be required regardless of

whether the land is disconnected or not. Similarly, the installation of the 12" water main was a necessary infrastructure investment; and the value it provided to Bluffdale city will not be lost as a result of the disconnection.

(3) The City's plan for the disconnect property would be impractical

Disconnection would seriously limit Bluffdale's ability to grow, but it must be noted that growth is not assumed in any event. The City's preference for one acre lots may make growth impossible. Ms. Wikstrom credibly opined that it would take in excess of 50 years to build out the disconnection property in one acre lots (as Bluffdale City would prefer), even assuming that the disconnection property absorbed 100 percent of the demand for one acre lots in Salt Lake and Utah counties.

(e) The disconnection would not create a peninsula

The proposed disconnection will not leave or create one or more islands or peninsulas of unincorporated territory. The statutory definition of a peninsula requires two separate calculations:

"Peninsula," when used to describe an unincorporated area, means **an area surrounded on more than ½ of its boundary distance**, but not completely, by incorporated territory and situated so that the length of a line drawn across the unincorporated area from an incorporated area to an incorporated area on the opposite side **shall be less than 25% of the total aggregate boundaries** of the unincorporated area.

Utah Code Ann. § 10-1-104(6). A disconnection only creates a peninsula if both tests are met.

- (1) **Following disconnect the remaining unincorporated area is not surrounded on more than ½ of its boundary distance by incorporated territory.**

The first of the two tests requires a determination of whether the disconnection creates an area that is surrounded on more than one-half of its boundary distance, but not completely by incorporated territory. The unincorporated area that disconnection would "leave or create" would be bordered in part by Bluffdale and in part by Herriman; however, the unincorporated area which is left or created is essentially infinite. The newly created unincorporated area would join other bordering unincorporated areas in Salt Lake County which in turn borders unincorporated areas in other counties throughout the state. In the Court's view, all contiguous unincorporated areas must be considered in making the calculation. Tracing the borders of incorporated territory reveals only islands and peninsulas of **incorporated land** in a vast ocean of unincorporated territory. In reality, unless other boundaries are utilized, the very definition which was created by the legislature makes the existence of a peninsula impossible, because of necessity, every "peninsula" with measurable boundaries will also be an island.

- (2) **The 25% test as interpreted by the City renders the statute vague**

Having concluded that the unincorporated area left or created by disconnection is not surrounded by more than one-half of its boundary distance by incorporated territory, it is not necessary to make the second calculation. The Court further concludes that if the term

"unincorporated area" were limited to the newly disconnected areas as the City proposes, the statute is rendered too vague to apply. In virtually any disconnection, it would be possible to draw a line from incorporated territory to incorporated territory on the opposite side that either does or does not meet the test. In this case, this difficulty was illustrated quite clearly at trial as counsel for both parties were able to draw lines from one portion of incorporated territory to a point "opposite" to support their positions. For instance, it is conceivable that a line could be drawn across a corner of any possible section of unincorporated land that will always be less than 25% of the aggregate boundaries of the unincorporated area if that area were limited to the disconnected area as Bluffdale proposes.

(3) The proposed disconnection does not meet the historical definition of "peninsula"

Because of the ambiguity that exists in the statutory definition of "peninsula," it is useful to examine historical usage of the word-particularly in the disconnection context. It is probable that the legislature attempted with the definition provided to describe a portion of land that, were it surrounded by water, would look like a "peninsula" as that word is commonly used. By definition a "peninsula" is "a piece of land that projects into a body of water and is connected with the mainland by an isthmus." The American Heritage Dictionary of the English Language (3d. Ed. 1992), 1338. An "isthmus" is "a narrow neck of land connecting two larger masses of land." Id., at 957. If the land here in question were "unincorporated land which projects into an area of

incorporated land and is connected with the main mass of unincorporated land by a narrow neck," it would be possible to apply the definition given by the statute to that land with more confidence. Here, the protrusion the disconnection would leave is shaped like a right triangle, with the narrowest portion farthest removed from the main body of unincorporated land. The Court cannot conclude that the legislature intended this land to be within its definition of a peninsula.

Absent a clear statutory definition, the Court turns to the historic use of the word. The statutory provisions limiting the creation of "peninsulas" or "peninsular land masses" were imposed to avoid irregular boundaries or areas of unincorporated territory which unreasonably disrupt either the county's or municipality's provision of services to its citizens. Here, no such dangers exist. When the land is considered as interrupting incorporated territory, all of Bluffdale is to the east of the disconnect property, and all of Herriman lies west of the disconnect. The ability of these two municipalities to provide services to their citizens would not in any way be impacted by the presence of this unincorporated section of land. Also, while the county would be required to cross through municipalities in order to provide services to the land, currently there are virtually no services to be provided to the land. Based upon these historic factors, the Court finds that no peninsula here exists.

(f) Salt Lake County is capable of providing cost-effective municipal services to the disconnected parcel.

Only minimal services, in the form of an occasional police call and seven or eight fire calls are currently provided to the property every year. The evidence at trial supports a conclusion that this minimal involvement would not cause a material increase in Salt Lake County's costs of providing these services. Similarly the evidence supports the conclusion that the County could provide these services cost effectively.

(g) Disconnection is not precluded because the petitioners may have had other remedies

Bluffdale City has argued that this action is improper and should be dismissed because it is simply the appeal of a zoning decision; and is an attempt to circumvent the boundary adjustment procedures at Utah Code Ann. § 10-2-419, which is the Petitioner's exclusive remedy. Neither of these contentions are well taken.

(1) This action is not an appeal of a zoning decision.

As this Court has previously held, this present action is a procedure which seeks distinct remedies from those available through appeal of a zoning decision under § 10-9-1001. While it was the Petitioners' right to appeal the December 9, 2003 decision to the District Court, they certainly did not waive the right to the distinct relief which a successful petition under § 10-2-501 would afford, because quite simply those issues were never raised in South Farm's attempt at amending the general plan and changing zoning. Cities need not be concerned that disconnection will result every time a landowner is unhappy with the planning and zoning decision. It is a rare circumstance that a landowner affected by a planning and zoning decision could meet

all the tests required for a successful disconnection case. This Court has not and would not order disconnection simply because a landowner was unhappy with a zoning decision. Justice and equity require that cities be allowed reasonable latitude in making such decisions.

(2) This action is not a boundary adjustment action.

Respondent argues that Utah Code Ann. § 10-2-419 provides the exclusive mechanism for boundary adjustment. Section 419, and § 10-2-510, upon which the Respondent relies for this conclusion, do not support this contention. Section 510, referring to the disconnection provisions contained in §§ 10-2-501 et seq. states:

This part shall not be construed to abrogate, modify, or replace the boundary adjustment procedure provided in Section 10-2-419.

Subsection (1) of § 10-2-419 states:

The **legislative bodies of two or more municipalities** having common boundaries may adjust their common boundaries as provided in this section.

Id. (Emphasis added). The language selected by the legislature makes clear that boundary adjustment is a procedure undertaken by two municipalities who act in concert. Indeed, under section 419 the only right of the owners of property within the portion proposed for adjustment is that they may object to the action. Section 10-2-419 does not provide a cause of action for a private landowner. When read in this context, because section 419 describes a procedure exclusive to municipalities, § 10-2-510 may not "abrogate, modify, or replace" the right of cooperating municipalities to adjust boundary lines.

CONCLUSION

Based upon the foregoing, Petitioner's Petition for Disconnection is hereby GRANTED. Petitioners are directed to prepare a Decree of Disconnection consistent with this opinion.

Dated this_____day of February, 2006.

ANTHONY B. QUINN
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Memorandum Decision, to the following, this_____day of February, 2006:

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